

SEP 27 2005

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

COMMISSION
SECRETARIAT

2005 SEP 27 A 11: 53

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5468R

DATE COMPLAINT FILED: June 24, 2004

DATE OF NOTIFICATION: July 1, 2004

DATE ACTIVATED: June 16, 2005

EXPIRATION OF SOL: June 17, 2009

COMPLAINANT:

Thomas J. Strini

RESPONDENTS:

George A. Moretz
George Moretz for Congress Committee and Roger
Bowman, in his official capacity as treasurer

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 431(6)
2 U.S.C. § 431(17)
2 U.S.C. § 432(e)(3)
2 U.S.C. § 441a(a)(7)(b)
11 C.F.R. § 100.22
11 C.F.R. § 106.1(a)
11 C.F.R. § 109.20
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by

Thomas J. Strini alleging that George Moretz and the George Moretz for Congress Committee

("the Moretz Committee") violated the Federal Election Campaign Act of 1971, as amended

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1 (“the Act”), by making an excessive “political contribution” to George W. Bush in the form of a
2 television advertisement allegedly criticizing Democratic presidential nominee John Kerry. *See*
3 Complaint at 1. George Moretz was a candidate for U.S. Representative from North Carolina’s
4 Tenth District in the 2004 Republican Primary on July 20, 2004. *See* Moretz Response at 1.

5 The Moretz Committee submitted a response contending that the complaint is frivolous
6 because (1) North Carolina did not have a Republican presidential primary, and, therefore, the
7 advertisement did not provide a benefit to the Bush campaign; (2) the advertisement merely
8 established Moretz’s endorsement of Bush’s policy in the war on terror, which was a significant
9 campaign issue in the Congressional race; and (3) there was no coordination between the Moretz
10 Committee and anyone associated with President Bush’s reelection campaign. *See id.* at 1-2.

11 For the reasons set forth below, this report recommends that the Commission find no
12 reason to believe that George Moretz, the George Moretz for Congress Committee, or Roger
13 Bowman, in his official capacity as treasurer, violated the Federal Election Campaign Act of
14 1971 (“the Act”), as amended, and close the file.¹

15 **II. FACTUAL AND LEGAL ANALYSIS**

16 The complaint alleges that the advertisement is a contribution to George W. Bush because
17 it attacks John Kerry’s position in the war on terror while saying little or nothing about George
18 Moretz’s congressional campaign. *See* Complaint at 1.

19 In March 2005, the Commission received a copy of the advertisement in question. The
20 content of the advertisement is as follows:

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¹ MUR 5468 was initially assigned to the Alternate Dispute Resolution Office on March 18, 2005; however, during the May 3, 2005 Executive Session, the matter was reassigned to the Office of General Counsel as MUR 5468R.

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VISUAL	AUDIO
<i>Still image of Osama Bin Laden; images of a burning vehicle, Muslims chanting and demonstrating. Bottom caption reads, "Muslim terrorists declare war on America."</i>	George Moretz: MUSLIM TERRORISTS DECLARED WAR ON AMERICA, BUT LIBERAL DEMOCRATS ACT LIKE THE ENEMY IS PRESIDENT BUSH
<i>Clip of John Kerry speaking with banner headline "Kerry attacks Bush" dated December 3, 2003 at the top of the screen.</i>	John Kerry: INEPT, RECKLESS, PROFOUNDLY DANGEROUS, RADICALLY WRONG
<i>George Moretz speaking with caption "George Moretz."</i>	George Moretz: JOHN KERRY IS WRONG. THE TERRORISTS WANT TO DESTROY US, AND ALL THAT AMERICA STANDS FOR. THIS IS A BATTLE WE MUST WIN. I'M GEORGE MORETZ AND I AUTHORIZE THIS AD.
<i>Still portrait of Moretz with caption "George Moretz, Republican for Congress" and disclaimer "Paid by George Moretz for Congress."</i>	Voiceover: GEORGE MORETZ, MADE IN AMERICA.

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2 Because the basis of the complaint centers on a Federal candidate's authorized committee

3 expending funds for a television advertisement that discusses another Federal candidate, the

4 relevant provision of the Act is 2 U.S.C. § 432(e)(3)(A), which provides that, "[n]o political

5 committee which supports or has supported more than one candidate may be designated as an

6 authorized committee." Although 2 U.S.C. § 432(e)(3)(A) does not specifically define the term

7 "support," 2 U.S.C. § 432(e)(3)(B) clarifies what "support" is *not* by stating that "[a]s used in

8 this section, the term 'support' does not include a contribution by any authorized committee in

9 amounts of \$2,000 or less to an authorized committee of any other candidate."² Thus, the issues

² The \$1,000 limit on contributions from one Federal candidate's authorized committee to the authorized committee of any other candidate was not increased under BCRA. 67 F.R. 76975. However, by an Act of December 8, 2004, Pub. L. No. 108-447, Congress amended 2 U.S.C. § 432(e)(3)(B) to increase the candidate-to-candidate contribution limit to \$2,000.

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1 that arise under 2 U.S.C. § 432(e)(3) are whether the Moretz Committee's television
2 advertisement was a contribution to the Bush campaign in excess of the \$2,000 limit; whether the
3 advertisement jeopardizes the Moretz Committee's status as an authorized committee because it
4 otherwise "supports" another Federal candidate; or whether the advertisement is an ordinary
5 operating expenditure of the Moretz Committee to which 2 U.S.C. § 432(e)(3) is inapplicable.

6 Addressing the first issue, if the Moretz Committee's advertisement was coordinated with
7 the Bush campaign, it could have been considered, at least in part, an in-kind contribution from
8 the Moretz Committee to the Bush campaign. *See* 2 U.S.C. § 441a(a)(7)(B)(i). However, no
9 information has been presented or is otherwise available suggesting that there was any
10 coordination, within the meaning of 11 C.F.R. §§ 109.20 or 109.21, between the Moretz
11 Committee and the Bush campaign in connection with this advertisement. Furthermore, the
12 complaint does not allege that the Moretz Committee coordinated the advertisement with the
13 Bush campaign, and in its Response, the Moretz Committee specifically denied any coordination
14 between the two campaigns. Based upon the foregoing, there is no information upon which to
15 infer that the television advertisement may have been coordinated, resulting in an in-kind
16 contribution from the Moretz Committee to Bush's campaign. Accordingly, the \$2,000
17 contribution limit of 2 U.S.C. § 432(e)(3)(B) does not apply to this case.

18 The next issue is whether 2 U.S.C. § 432(e)(3)(A) precludes the Moretz Committee from
19 independently spending funds on advertisements that mention or could be construed to "support"
20 another candidate. *See* 2 U.S.C. § 432(e)(3)(B); *see also* 2 U.S.C. § 431(6) (defining the term
21 "authorized committee" to include a candidate's principal campaign committee). As stated
22 above, 2 U.S.C. § 432(e)(3) does not expressly define what constitutes "support" as used in this
23 section, but merely states that "support" does *not* include contributions of less than \$2,000 from

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one candidate's authorized committee to another candidate's authorized committee. *See* 2 U.S.C. § 432(e)(3)(B). This definition leaves open the question of whether 2 U.S.C. § 432(e)(3)(B) operates as a bar on independent spending by the authorized committee of a federal candidate in "support" of another federal candidate.

The Commission has addressed the impact of 2 U.S.C. § 432(e)(3) on independent spending by an authorized committee on two occasions, both more than a decade ago. In both instances, this Office concluded that 2 U.S.C. § 432(e)(3)(A) prohibited independent expenditures by a Federal candidate's authorized committee on behalf of other Federal candidates. In MUR 2841 (Jenkins), the complaint alleged that Ed Jenkins for Congress ("Jenkins Committee") made an excessive in-kind contribution to Gephardt for President in the form of a newspaper advertisement. *See* MUR 2841, General Counsel's Report (January 25, 1991). The Jenkins Committee claimed that the advertisement was an independent expenditure and thus not subject to limitation. *See id* at 2-3. Although this Office found evidence of coordination between the Jenkins Committee and the Gephardt Committee, this Office drafted a supplemental brief on the issue of whether or not the Jenkins Committee could make independent expenditures on behalf of another Federal candidate. *See id.* at 6. In interpreting the Act to preclude authorized committees from making independent expenditures on behalf of another Federal candidate, the brief relied upon the language of 2 U.S.C. § 432(e)(3)(B) as carving out a very limited exception to the term "support" in the form of a (then) \$1,000 contribution, anything outside of which would remove a committee's "authorized" status. While the Commission ultimately voted to find probable cause to believe that the Jenkins Committee made an excessive in-kind contribution to the Gephardt campaign and, as such, violated 2 U.S.C. § 432(e)(3) by exceeding the \$1,000 candidate-to-candidate contribution limitation of section

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432(e)(3)(B), the conciliation agreement signed by the parties noted that, "In the Commission's view, the Act precludes a principal campaign committee from making expenditures on behalf of another candidate, thus supporting more than one candidate, and still remaining a principal campaign committee." *See* Conciliation Agreement for MUR 2841 (December 11, 1992).

Similarly, in MUR 3676 (Stupak), the complaint alleged that Stupak for Congress ("Stupak Committee") made an in-kind contribution to Clinton/Gore '92 in the form of a television advertisement. *See* MUR 3676, First General Counsel's Report (December 22, 1994). Finding no evidence of coordination between the Stupak Committee and the Clinton/Gore campaign, this Office determined that the advertisement expressly advocated the election of both Stupak and Clinton and, thus, was in part an independent expenditure of the Stupak Committee on behalf of Clinton. *See id.* at 11. This Office relied upon the General Counsel's Brief in MUR 2841 in arguing that although a principal campaign committee cannot, constitutionally, be specifically prohibited from making independent expenditures, such expenditures may violate 2 U.S.C. § 432(e) and thus jeopardize an authorized committee's status. *See id.* at 12. The Commission rejected by a vote of 2-4 this Office's recommendation that it find reason to believe that the Stupak Committee violated 2 U.S.C. §§ 432(e) and 441d. The four Commissioners in the majority, however, disagreed on the rationale for the decision. Commissioner Thomas, writing alone, rejected the conclusion that section 432(e)(3) constructively barred authorized committees from making independent expenditures on behalf of other Federal candidates by jeopardizing their authorized status. *See* Certification, MUR 3676 (January 11, 1995); Statement of Reasons, Commissioner Scott E. Thomas (February 8, 1995). He based his argument upon the legislative history of the provision and on *Buckley v. Valeo*, which struck down limits on independent expenditures for most individuals and groups. *See id.* (citing

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1 *Buckley v. Valeo*, 424 U.S. 1 (1976). Commissioners Aikens, Elliott, and Potter objected to the
2 recommendation on the basis that the advertisement did not expressly advocate the election of
3 Bill Clinton, but they did not address whether 2 U.S.C. § 432(e)(3)(A) prohibited independent
4 spending by authorized committees. *See* Statement of Reasons, Commissioners Aikens, Elliott
5 and Potter. (March 9, 1995).

6 Had MURs 2841 and 3676 been the last word on the Commission's ability to restrict
7 independent spending by an entire class of committees, it would be plausible to suggest that
8 2 U.S.C. § 432(e)(3) prohibits authorized committees from funding communications that
9 "support" another Federal candidate. However, in the interim, the Supreme Court determined in
10 *Colorado Republican I* that the First Amendment prohibits limitations on political party
11 committee expenditures that are made independently and without coordination with any
12 candidate. *See Colorado Republican Fed. Campaign Comm. v. Federal Election Commission*,
13 518 U.S. 604, 608 (1996). *Colorado Republican I* was a straightforward application of *Buckley's*
14 holding that limits on independent expenditures generally are unconstitutional because they are
15 not narrowly tailored to protect the compelling state interest of avoiding political corruption. *See*
16 *id.* at 614-615. *Colorado Republican I* effectively overturned a Commission regulation, 11
17 C.F.R. § 110.7(b)(4), which prohibited an entire class of committees – party committees – from
18 making independent expenditures. In light of the Supreme Court's ruling and rationale in
19 *Colorado Republican I*, it is unlikely that interpreting 432(e)(3) to prohibit independent spending
20 by authorized committees would withstand a constitutional challenge, at least as applied to these
21 circumstances involving a single, isolated communication that nominally "supports" another
22 candidate.

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Thus, the only remaining question is whether any part of the Moretz advertisement expressly advocates the election of George Bush or the defeat of John Kerry, in which case that portion would be an independent expenditure required to be allocated pursuant to 11 C.F.R. § 106.1. Under the Act, the term “independent expenditure” is defined as “an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” *See* 2 U.S.C. § 431(17). Under Commission regulations, “expressly advocating” means a communication that uses phrases such as “vote for the President,” “Smith for Congress,” “or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)...” *See* 11 C.F.R. § 100.22(a); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *see also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (“*MCFL*”). Under § 100.22(b) of the regulation, “expressly advocating” also means a communication that, when taken as a whole, could only reasonably be interpreted as advocating the election or defeat of a clearly identifiable Federal candidate because it contains an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable minds could not differ as to whether it encourages actions to elect or defeat” a candidate. *See* 11 C.F.R. § 100.22(b).

The advertisement in question has two distinct portions; the former of which features 2004 Presidential candidates George Bush and John Kerry and the latter of which features George Moretz. Unquestionably, the text in the last visual image of the advertisement – “George Moretz, Republican for Congress” – expressly advocates the election of George Moretz to Congress. Campaign slogans, such as “Smith for Congress,” are included in 11 C.F.R.

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§ 100.22(a) as examples of the types of communications that expressly advocate the election or defeat of a Federal candidate. *See* 11 C.F.R. §100.22(a). With respect to the portion that features Bush and Kerry, the relevant inquiry is whether the advertisement expressly advocates the election or defeat of either candidate. *See* 2 U.S.C. § 431(17). If it does not, then no portion of the advertisement would constitute an independent expenditure in support of Bush or Kerry, and the Moretz Committee would have simply been required to report the advertisement as an ordinary operating expenditure, which it appears to have done in its 2004 Pre-Primary Quarterly Report.

Applying these principles to the present matter, the portion of the advertisement that discusses the Presidential candidates does not appear to expressly advocate the election or defeat of George Bush or John Kerry. While the advertisement identifies the opposing candidates in the 2004 Presidential Election, it does not contain the so-called "magic words" listed in *Buckley* or the related phrases found at 11 C.F.R. § 100.22(a), nor does it contain an explicit directive to vote for Bush or against Kerry. Thus, the advertisement would not constitute express advocacy under 11 C.F.R. § 100.22(a). Furthermore, the advertisement does not satisfy 11 C.F.R. § 100.22(b) because while it arguably contains an electoral portion through a comparison of Bush and Kerry, it potentially has several meanings, including showing Moretz's support for Bush's policy on the war on terror, his assertion that the terrorists are the enemy, his disagreement with John Kerry's reported comments about President Bush's handling of the war on terror, and an affirmation that Moretz regards the war on terror as an important campaign issue. At most, this advertisement appears to have been intended to align Moretz with George Bush, rather than John Kerry, with respect to the war on terror. Moreover, the only directive given in the portion of the advertisement that features the Presidential candidates is that the war on terror "is a battle we

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must win." The advertisement provides only one explicit answer as to how to win the battle: by voting for "George Moretz, Republican for Congress." It urges no other action at all, much less one about which reasonable minds could differ. See 11 C.F.R. § 100.22(b)(2).

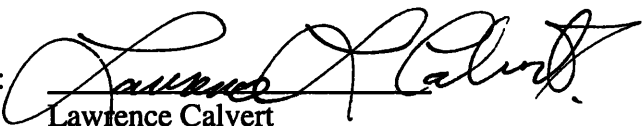
Based upon the foregoing analysis, it does not appear that the television advertisement was anything other than an ordinary operating expenditure of the Moretz Committee. Accordingly, this Office recommends that the Commission find no reason to believe that George A. Moretz, the George Moretz for Congress Committee, and Roger Bowman, in his official capacity as treasurer, violated the Act in connection with the complaint filed in MUR 5468R.

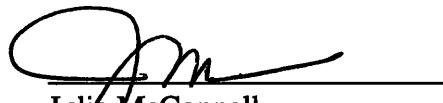
III. RECOMMENDATIONS

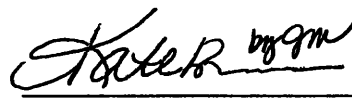
1. Find no reason to believe that George A. Moretz, the George Moretz for Congress Committee, and Roger Bowman, in his official capacity as treasurer, violated the Act in connection with the complaint filed in MUR 5468R.
2. Approve the appropriate letters.
3. Close the file.

Lawrence H. Norton
General Counsel

9/27/05
Date

BY: 
Lawrence Calvert
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